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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOSE ORTIZ,

Plaintiff,

-v-

BREADROLL, LLC d/b/a MAISON KAYSER,

Defendant.

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MEMORANDUM ORDER

16-CV-7998 (JLC)

JAMES L. COTT, United States Magistrate Judge.

By letter dated April 17, 2016 submitted to the Court via e-mail,[1] counsel for defendant/counterclaimant Breadroll LLC requested that the Court grant the parties' joint request to file their joint motion for approval of the settlement agreement (as well as the settlement agreement itself) in this wage-and-hour case under seal, and permit a confidentiality clause to be included in the settlement agreement. While acknowledging that there is a presumption of public access to settlement agreements in cases of this kind, the parties justify their requests on the following grounds: (1) there are more than merely claims under the Fair Labor Standards Act ("FLSA") at issue in the case, and in particular, a host of counterclaims that are also being settled to which the presumption of public access does not apply; (2) the settlement of the FLSA claims cannot be separated out from the settlement of the counterclaims, the latter of which do not require judicial scrutiny; (3) in order to evaluate the reasonableness of the settlement agreement, the Court will have to examine the ranges of possible recovery for both parties; and (4) in order to evaluate the reasonableness of the settlement agreement, the Court will have to assess the parties' respective burdens and expenses in establishing their claims and defenses, and in particular consider the heavy burden that plaintiff faces to continue with the litigation given the nature of the allegations pled in the counterclaims. The parties did not raise any of these issues at the conference before the Court in March when a settlement was reached.

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[1] The letter was mistakenly dated April 17, 2016, rather than April 17, 2017.

"Under the common law right to access, a presumption of public access attaches to any 'judicial document' . . . ." Wolinsky v. Scholastic Inc., 900 F. Supp. 2d 332, 337 (S.D.N.Y. 2012). Because under Cheeks v. Freeport Pancake House, 796 F.3d 199 (2d Cir. 2015), cert. denied, 136 S. Ct. 824 (2016), FLSA settlement agreements need to be approved by a court, they are considered to be "judicial documents" to which a presumption of public access applies. See, e.g., Geskina v. Admore Air Conditioning Corp., No. 16-CV-3096 (HBP), 2017 WL 1162910, at *2–3 (S.D.N.Y. Mar. 28, 2017); Lopez v. 41-06 Bell Blvd. Bakery LLC, No. 15-CV-6953 (SJ) (PK), 2016 WL 6156199 at *2 (E.D.N.Y. Oct. 3, 2016) (Report & Recommendation), adopted by, 2016 WL 6208481 (E.D.N.Y. Oct. 21, 2016); Lopez v. Nights of Cabiria, LLC, 96 F. Supp. 3d 170, 178 (S.D.N.Y. 2015); Wolinsky, 900 F. Supp. 2d at 337-38. Curasi v. Hub Enters., Inc., No. 11-CV-2620 (JS) (GRB), 2012 WL 728491 at *1 (E.D.N.Y. Mar. 5, 2012). "To overcome the presumption, the parties must make a substantial showing of need for the terms of their settlement not to be filed on the public docket." Curasi, 2012 WL 728491 at *1 (internal quotation marks omitted); accord Lopez, 2016 WL 6156199 at *2 ("A judicially approved FLSA settlement agreement should not be filed under seal, except in the very limited circumstance where parties can make a substantial showing that their need to seal the agreement outweighs the strong presumption of public access that attaches to such judicial documents." (internal quotation marks and citations omitted)).

Here, the parties have not overcome the presumption of public access to their FLSA settlement. They contend that the FLSA claims are inextricably intertwined with the counterclaims, but that is not the case. Whether plaintiff was misclassified as an exempt employee and/or was provided with the proper wage notices are entirely distinct inquiries from whether defendant's counterclaims have merit. Moreover, the allegations underpinning the counterclaims are already a matter of public record (Dkt. No. 18), so the argument that the settlement needs to be filed under seal for purported "compelling privacy reasons" is unpersuasive. In addition, the only authorities from the Second Circuit that the parties cite in favor of filing their settlement agreement under seal are Passarinho v. Handybook, Inc., No. 15-CV-3984 (GWG) (Dkt. No. 64) (S.D.N.Y. Order dated Mar. 28, 2016), where no reasoning or citation to case law is provided in the summary order granting such relief, and Lola v. Skadden, Arps, Meagher, Slate & From LLP, No. 13-CV-5008 (RJS), 2016 WL 922223, at *2 (S.D.N.Y. Feb. 3, 2016), where the settlement agreement and the letter seeking its approval were, in fact, filed on the public docket, thus making it inapposite.[2] The only other cited case from this Circuit, Medley v. Am. Cancer Soc., No. 10-CV-3214 (BSJ), 2010 WL 3000028, at *1 (S.D.N.Y. July 23, 2010), predates the Second Circuit's seminal decision in Cheeks; the other 13 cases cited are all decisions from courts outside of the Second Circuit.

Having concluded that the parties have not overcome the presumption of public access for their wage-and-hour settlement, the Court observes that there is authority for a bifurcated settlement agreement, in which the parties submit their FLSA agreement for court review and approval on the public record, but enter into a separate and confidential settlement agreement with respect to the counterclaims. See, e.g., Yunda v. Safi-G, Inc., No. 15-CV-8861 (HBP), 2017 WL 1608898, at *2 (S.D.N.Y. Apr. 28, 2017) (approving the submission of two settlement agreements, one resolving plaintiff's FLSA claims that required court approval under Cheeks

[2] In Lola, the Court did approve the inclusion of a non-disclosure provision in the settlement agreement, but this is plainly the minority view on that issue in this District. See Souza v. 65 St. Marks Bistro, 15-CV-327 (JLC), 2015 WL 7271747, at *4 (Nov. 6, 2015) (collecting cases).

and the other resolving plaintiff's claims under New York Labor Law that did not require approval under Cheeks and containing a confidentiality clause, among other provisions); Abrar v. 7-Eleven, Inc., No. 14-CV-6315 (ADS) (AKT), 2016 WL 1465360, at *1 (E.D.N.Y. Apr. 14, 2016) (approving similar structure). Thus, should the parties choose to do so, they may submit their FLSA settlement for court approval, but memorialize their settlement of the counterclaims in a separate agreement, which could include confidentiality provisions and would not be subject to judicial approval.

Accordingly, for the foregoing reasons, the Court cannot approve the settlement as presented at this time. If the Court were to do so, it would encourage litigants in a case brought under the FLSA to avoid public judicial scrutiny simply by including a non-FLSA claim or counterclaim (assuming Rule 11 was satisfied, of course) and then justifying a non-public review process by arguing that all of the claims were bound together. The Circuit made it crystal clear in Cheeks, however, that the "unique policy considerations underlying the FLSA" require judicial approval of all FLSA settlement agreements, making them judicial documents to which a presumption of public access applies. Cheeks, 796 F.3d at 206.

In light of the Court's ruling, the parties may proceed in one of the following ways:

1. The parties may file their proposed settlement agreement covering both plaintiff's claims and defendant's counterclaims, along with their joint motion for approval of the agreement, unredacted and without any confidentiality provision, on the public docket for the Court's review and approval.
2. The parties may proceed with a bifurcated settlement and submit an FLSA settlement agreement to the Court (with a joint motion for approval), publicly filed, and settle

the counterclaims in a separate, confidential agreement that would not require judicial review.

3. The parties may stipulate to a dismissal of this case without prejudice, as such settlements do not require court approval. See Cheeks, 796 F.3d at 201, n. 2.

4. The parties may file a letter indicating their intention to abandon the settlement and proceed with the litigation.

Whatever course of action is selected, the parties must make some further submission to the Court no later than **May 26, 2017**. In order to ensure that the record is complete, the Court will file the April 17, 2017 [sic] letter (with attachments) under seal as the parties did not intend for it to be included on the public docket of the case.

SO ORDERED.

Dated: May 15, 2017
New York, New York

JAMES L. COTT
United States Magistrate Judge